

**IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO**

STATE OF OHIO EX REL.,)	Case No. 04CV001080
ROBERT MERRILL, TRUSTEE, et al.)	
)	Judge Eugene A. Lucci
Plaintiffs-Relators)	
)	<u>MOTION OF THE STATE OF OHIO</u>
vs.)	<u>FOR STAY AND BRIEF IN SUPPORT</u>
)	
STATE OF OHIO, DEPARTMENT)	
OF NATURAL RESOURCES, et al.)	
)	
Defendants-Respondents,)	
Counterclaimants, and)	
Cross-claimants)	
)	
vs.)	
)	
UNITED STATES OF AMERICA, et al.)	
)	
Cross-claim Defendants)	

Defendants-Respondents State of Ohio, Department of Natural Resources, Sam Speck, Director, Ohio Department of Natural Resources, and the State of Ohio (hereinafter collectively “the State of Ohio” or “the State”), by and through counsel, Attorney General Jim Petro, hereby move the Court for a stay of the hearing on Plaintiffs-Relators’ Motion for Class Certification on Count I of the First Amended Complaint, currently set for March 4, 2005, until such time as the pleadings have closed; removal to federal court is decided; and all parties have had a meaningful opportunity to conduct discovery on Class Certification issues. The grounds for requesting this relief are more fully set forth below in the accompanying Brief in Support which is incorporated into this motion as if fully set forth herein.

BRIEF IN SUPPORT

I. WITH THE ADDITION OF THE UNITED STATES OF AMERICA AND ITS ARMY CORPS OF ENGINEERS AS PARTIES, THIS LAWSUIT WILL BE REMOVED TO FEDERAL COURT.

The allegations of Plaintiffs-Relators’ First Amended Complaint raise significant questions of federal law. Further, the interests conveyed by the United States of America

(hereinafter “the United States”) to the State of Ohio and to the upland owners bordering Lake Erie in this state, as well as those interests retained by the United States and the jurisdiction and authority delegated to its Army Corps of Engineers were brought into question by Plaintiffs-Relators. Consequently, the United States and the U.S. Army Corps of Engineers (hereinafter “the Corps”) are necessary parties for just adjudication of this case.

The State of Ohio is not able to represent or defend these parties’ interests. To provide these parties with the opportunity to defend their interests against the claims of Plaintiffs-Relators, as well as other claims that might arise in this action, the United States and the Corps were named as new Cross-claim Defendants. (See Answer, Counterclaim and Cross-claim of Defendants-Respondents State of Ohio, Department of Natural Resources; Sam Speck, Director, Ohio Department of Natural Resources, and; the State of Ohio, filed contemporaneously with this Motion for Stay)

Removal of this action to federal court will likely be the first action taken in this case by new party Cross-claim Defendants the United States and the Corps. Therefore, in order to conserve the time, energy and resources of this Court, it is prudent to stay the hearing regarding Plaintiffs-Relators’ Motion for Class Certification until such time as removal is effectuated.

II. THE STATE OF OHIO HAS BEEN FORECLOSED OF ANY DISCOVERY WHATSOEVER FROM PLAINTIFFS-RELATORS REGARDING THEIR REQUEST FOR CLASS CERTIFICATION.

The Court’s Order of January 14, 2005 scheduling the hearing on Plaintiffs-Relators’ Motion for Class Certification was based on Plaintiffs’ express representations, including that they could provide the State of Ohio with responses to discovery within 10 days of service upon Plaintiffs-Relators’ counsel. (See Plaintiffs-Relators’ Response to Motion of the State of Ohio for Extension of Time, for Continuance of Hearing, and for Prehearing Conference) The State’s first discovery requests were received by counsel for Plaintiffs-Relators on January 19, 2005 (as to all Plaintiffs-Relators other than Plaintiff-Relator Ohio Lakefront Group, Inc.) and February 1, 2005 (as to Plaintiff-Relator Ohio Lakefront Group, Inc.). As of this date, **no** responses to the State of Ohio’s first discovery request have been provided.

The State's first discovery request included interrogatories and document requests directly related to the specific class action allegations made by Plaintiffs-Relators. If these responses had been provided to the State within Plaintiffs-Relators' anticipated deadline, then the State may have had time to determine whether depositions of certain Plaintiffs-Relators were needed, prior to the hearing. Moreover, a determination could have been made whether to call these parties to testify at the hearing. All of these opportunities for the State to adequately prepare for the class certification hearing have been foreclosed, as a result of Plaintiffs-Relators' lack of timely responses as represented to the Court and the State.

Plaintiffs-Relators have put the State at a decided disadvantage. It would be manifestly prejudicial to go forward with the class certification hearing on March 4, 2005, when such fundamental factual class certification information is in the possession of the Plaintiffs-Relators, but not shared with the State. The lack of any responses to the State's discovery warrants a stay of the proceedings until such time as the State may meaningfully prepare for the hearing.

III. ALL PROCEEDINGS ON CLASS CERTIFICATION SHOULD BE STAYED UNTIL THE PLEADINGS ARE CLOSED.

Moving forward with the hearing on Plaintiffs-Relators' Motion for Class Certification prior to the close of the pleadings will not allow Plaintiffs-Relators the benefit of reviewing and responding to the State's Answer and Counterclaim. It will not allow the Cross-claim Defendants, the United States of America and the U.S. Army Corps of Engineers, the opportunity to respond to the State's Cross-claim and to present any claims or defenses on their own behalf in this action and pertaining to Plaintiffs-Relators' Motion for Class Certification. Further, such premature progression will not allow the parties to engage in meaningful discovery clearly required in order for any court to make the findings required to either grant or deny a Motion for Class Certification. *Howland v. Purdue Pharma* (2004), 2004 Ohio 6552, ¶24; *Warner v. Waste Management* (1988), 36 Ohio St. 3d 91, n.9, 521 N.E.2d 1091; *Simmons v. American General* (2000), 140 Ohio App.3d 503; 748 N.E.2d 122.

Therefore, in the interest of justice, and to conserve the time and resources of the Plaintiffs, the taxpayers of the State of Ohio, and the Court, the State respectfully requests that

the Court accordingly stay of the hearing on Plaintiffs-Relators' Motion for Class Certification on Count I of the First Amended Complaint, currently set for March 4, 2005. A proposed order granting this Motion is attached hereto for the Court's consideration pursuant to Paragraph {3} of the Honorable Judge Eugene A. Lucci's Order of Procedure (Civil) (Revised 10/28/2003).

Respectfully submitted,

JIM PETRO
ATTORNEY GENERAL



CYNTHIA K. BRAZZINI (0066398)

JOHN P. BARTLEY (0039190)

Assistant Attorneys General
Environmental Enforcement Section
Ohio Attorney General's Office
Environmental Enforcement Section
2045 Morse Road, Building D-2
Columbus, Ohio 43229-6693
(614) 265-6870 (phone)
(614) 268-8871 (facsimile)

CERTIFICATE OF SERVICE

We hereby certify that a copy of the foregoing **Motion of the State of Ohio for Stay and Brief in Support** was sent by regular U.S. mail, postage prepaid, this 23rd day of February, 2005 to:

James F. Lang
Michael T. Mulcahy
Henry G. Grendell
Attorneys at Law
CALFEE, HALTER & GRISWOLD LLP
1400 McDonald Investment Center
800 Superior Avenue
Cleveland, Ohio 44114-2688

**Counsel for
Plaintiffs-Relators**

Homer S. Taft
Attorney at Law
20220 Center Ridge Road, Suite 300
P.O. Box 16216
Rocky River, Ohio 44116

**Plaintiff-Relator, Pro Se
in *State ex rel. Taft***

L. Scot Duncan
Attorney at Law
1530 Willow Drive
Sandusky, Ohio 44870

**Plaintiff-Relator, Pro Se
and Counsel for
Plaintiff-Relator Darla J. Duncan
in *State ex rel. Taft***

The United States of America
Attorney General of the United States
c/o Assistant Attorney General for
Administration
United States Department of Justice
Justice Management Division
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

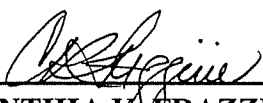
Cross-claim Defendant

United States Army Corps of Engineers
U. S. Army Engineer District, Buffalo
1776 Niagara Street
Buffalo, NY. 14207-3199

Cross-claim Defendant

The United States Attorney
Northern District of Ohio
801 West Superior Avenue
Suite 400
Cleveland, Ohio 44113

Cross-claim Defendant



**CYNTHIA K. FRAZZINI (0066398)
JOHN P. BARTLEY (0039190)**
Assistant Attorneys General
Ohio Attorney General's Office